TAN SRI KHOO TECK PUAT & ANOR.

v.

PLENITUDE HOLDINGS SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATUK CHONG SIEW FAI FCJ
DATO' WAN ADNAN BIN ISMAIL FCJ
[CIVIL APPEAL NO. 02-220 OF 1994]
7 DECEMBER 1994

CONTRACT: *Breach of contract - Assessment of damages - Housing project not taking off due to breaches of undertakings by defendants/appellants - Claim for loss of profit on housing project - Method of computation of loss - Principles applicable - Whether increase in value of land could offset damages suffered.*

The purchaser of a piece of land sued for specific performance of a sale and purchase agreement. The trial Judge made an order for specific performance and ordered the vendor to pay damages to be assessed. (See [1992] 4 CLJ 1882). The vendors appeal to the Supreme Court was dismissed. (See [1993] 2 CLJ 146).

In the hearing relating to the assessment of damages, the learned Judge of the High Court awarded the purchaser RM13,500,000 for loss of profits, RM31,000 as reimbursement of engineers' fees, RM31,783 as reimbursement of surveyors' fees, RM1,756,772.91 as loss of interest and RM867,969 for loss of cash flow investment (See [1994] 2 CLJ 796).

The vendor appealed to the Federal Court against the decision of the learned Judge and the purchaser cross-appealed on the alleged inadequacy of the damages awarded.

Held:

[1] In considering the overall position of the purchaser, the Court should not wear blinkers and ignore the fact that the purchaser stands to make a substantial profit on the price increase of the land in question because of the breach of contract, which should therefore be deducted from the loss of profits. Not to do so would be to put the purchaser in a better position than it would have been in if the contract had been performed in 1988. Further, to countenance such a claim by the purchaser would amount to countenancing a claim for double recovery.

[2] As there was uncontradicted evidence that the land was worth RM119,560,000 at the time of the trial in 1993, and bearing in mind that the contractual price was just under RM48,000,000, upon the evidence the purchaser had not proved its claim for loss of profits and it followed that the award for loss of profits must be set aside.

[3] The basis of the purchasers' claim which resulted in the awards for reimbursement of the engineers' and surveyors' fees was that they represented wasted expenses. Bearing in mind that the object of damages is to restore a plaintiff to the position he would have been in but for the wrong, and when it is remembered that the purchaser had also claimed for loss of profits for anticipated sales and that now that it has secured the title to the land, and most probably will be proceeding to develop the land for profit, these two awards represent expenses which the purchaser would have incurred anyway. In the circumstances, these two awards do not represent wasted expenses or costs thrown away and the learned Judge should have disallowed both these claims.

[4] As for the award of RM1,756,772.91 being loss of interest on the 10% deposit paid under the sale and purchase agreement, there were concurrent findings both by the Judge and the Supreme Court that the agreement was never legally terminated. At all material times, the purchaser had treated the agreement as being alive and on foot and was vindicated by both Courts with the result that the deposit became the property of the vendor, the purchaser having no right to the use of the money. It follows that the award under this head of claim was, with respect, quite untenable and must be set aside.

[5] As for the award for loss of cash flow investment, the idea underlying this head of claim was the concept of the joint venture scheme with the purchaser and the vendor having a 10% and a 90% equity therein respectively. However the concept of a joint venture scheme never materialised since the purchaser did, indeed, secure title to the land. If the concept of a joint venture scheme failed then this award must necessarily fail. In the circumstances, the award should be set aside as being based on a misconception.

[6] The awards made by the learned Judge would place the purchaser in a far better position than it would have been in if there had been due compliance by the vendor. This would be contrary to the fundamental principle of the role of the Court when making an assessment of damages, namely, to ensure that the victim of a breach of contract is "to be placed in the same situation as if the contract had been performed".

[7] In the circumstances, the basis upon which the learned Judge had assessed the various awards of damages, cannot be supported in law, having regard to the particular circumstances of the case, and the relevant authorities.

[Appeal allowed with costs. Cross-appeal dismissed. Judgment of Court below set aside and substituted with judgment for the purchaser for nominal damages of RM10. No order as to costs in the Court below]

[**Bahasa Malaysia** Translation of Headnote]

KONTRAK: *Kemungkiran kontrak - Penilaian ganti-rugi - Projek perumahan tidak bermula akibat kemungkiran-kemungkiran akujanji oleh defendan-defendan/perayu-perayu - Tuntutan bagi kehilangan keuntungan atas projek perumahan - Cara pengiraan kerugian - Dasar-dasar yang terpakai - Sama ada kenaikan nilai tanah dapat mengimbang gantirugi yang dialami.*

Pembeli sebidang tanah mendakwa untuk perlaksanaan spesifik perjanjian jualbeli. Hakim perbicaraan membuat satu perintah untuk perlaksanaan specifik dan memerintahkan penjual supaya membayar gantirugi yang akan dinilaikan. (Lihat [1992] 4 CLJ 1882) Rayuan penjual kepada Mahkamah Agung telah ditolak. (Lihat [1993] 2 CLJ 146)

Dalam perbicaraan berhubung dengan penilaian gantirugi, Hakim Mahkamah Tinggi yang bijaksana telah memberikan pembeli RM13,500,000 bagi kehilangan kerugian, RM31,000 sebagai imbuhan fee jurutera, RM31,783 sebagai imbuhan fee juru-ukur, RM1,756,772.91 sebagai kerugian faedah dan RM867,969 bagi kehilangan pelaburan aliran tunai.(Lihat [1994] 2 CLJ 796).

Penjual tersebut telah merayu kepada Mahkamah Persekutuan terhadap keputusan Hakim yang bijaksana itu dan pembeli telah merayu-balas atas award gantirugi yang dikatakan tak memadai.

Diputuskan:

[1] Dalam mempertimbangkan keseluruhan kedudukan pembeli, Mahkamah tidak seharusnya menutup mata dan tidak mnghiraukan hakikat bahawa pembeli akan mendapat keuntungan yang besar atas kenaikan harga tanah yang dipersoalkan kerana kemungkiran kontrak tersebut,

yang mana dengan itu ianya haruslah ditolak daripada kehilangan keuntungan. Dengan tidak melakukan demikian akan meletakkan pembeli dalam kedudukan yang lebih baik daripada yang ianya mungkin berada jika kontrak tersebut telah dilaksanakan dalam tahun 1988. Selanjutnya, untuk menyetujui tuntutan yang sedemikian oleh pembeli akan membawa kepada penyetujuan satu tuntutan untuk mendapatkan kembali secara berganda.

[2] Oleh kerana terdapatnya keterangan yang tidak bercanggah bahawa tanah tersebut bernilai RM119,560,000 ketika perbicaraan tersebut dalam tahun 1993, dan memikirkan bahawa harga kontraktual adalah hanya kurang sedikit daripada RM48,000,000, atas keterangan, pembeli telah tidak membuktikan tuntutannya bagi kehilangan keuntungan dan disusuli bahawa award bagi kehilangan keuntungan haruslah diketepikan.

[3] Asas tuntutan penbeli yang menghasilkan award-award untuk imbuhan fee jurutera dan juru-ukur adalah bahawa ianya menunjukkan perbelanjaan-perbelanjaan yang tidak berhasil. Dalam menimbangkan bahawa objek gantirugi ialah untuk memulihkan plaintif kepada kedudukan yang beliau mungkin berada kecuali disebabkan oleh kemungkinan yang telah berlaku, dan apabila diingat kembali bahawa pembeli telah juga menuntut bagi kehilangan keuntungan bagi jualan-jualan yang dijangkakan dan bahawa kini ianya telah memperolehi hakmilik kepada tanah tersebut, dan berkemungkinan akan terus membangunkan tanah tersebut dan mendapat keuntungan, kedua-dua award ini menunjukkan perbelanjaan yang akan dialami oleh pembeli dalam apa cara pun. Dalam keadaan yang sedemikian, kedua-dua award ini tidak menunjukkan perbelanjaan yang sia-sia sahaja atau kos yang terbuang dan Tuan Hakim yang bijaksana seharusnya tidak membenarkan tuntutan-tuntutan ini.

[4] Berhubung award RM1,756,772-91 yang merupakan kehilangan faedah ke atas 10% deposit yang dibayar di bawah perjanjian jualbeli tersebut, terdapat pendapat bersama oleh kedua-duanya Hakim dan Mahkamah Agung bahawa perjanjian tersebut tidak pernah ditamatkan secara sah di sisi udang-undang. Pada setiap waktu yang material, pembeli telah menganggapkan perjanjian tersebut sebagai berkuatkuasa dan kedudukan telah dipertahankan oleh kedua-dua Mahkamah dengan keputusan bahawa deposit tersebut menjadi harta penjual dan pembeli tidak mempunyai hak ke atas penggunaan wang tersebut. Adalah disusuli bahawa award di bawah tajuk tuntutan ini tidak dapat dipertahankan dan seharusnya diketepikan.

[5] Berhubung dengan award untuk pelaburan aliran tunai, tujuan disebalik tuntutan ini adalah konsep skim usaha-sama dengan pembeli dan penjual mempunyai ekuiti 10% dan 90% di dalamya masing-masingnya. Walaubagaimanapun, konsep usaha-sama tersebut tidak pernah wujud oleh kerana pembeli telah sesungguhnya memperolehi hakmilik kepada tanah tersebut. Jika konsep skim usaha-sama tersebut gagal maka award ini tentunya haruslah gagal. Dalam keadaan yang demikian, award tersebut seharusnya diketepikan sebagai berasaskan pada salah konsep.

[6] Award-award yang dibuat oleh Tuan Hakim yang bijaksana akan meletakkan pembeli dalam kedudukan yang jauh lebih baik daripada yang ianya mungkin berada jika berlakunya pematuhan yang sepatutnya oleh penjual. Ini akan bercanggahan dengan prinsip asasi peranan Mahkamah ketika membuat penilaian gantirugi, iaitu, bagi memastikan bahawa mangsa kemungkiran kontrak harusIah "diletakkan dalam keadaan yang sama seolah-olah kontrak tersebut telah dilaksanakan."

[7] Dalam keadaan yang sedemikian, asas ke atas mana Tuan Hakim yang bijaksana telah menilaikan pelbagai award-award gantirugi, tidak boleh disokong di sisi undang-undang, dalam mempertimbangkan keadaan khusus kes tersebut, dan authoriti-authoriti yang relevan.

[Rayuan dibenarkan dengan kos. Rayuan balas ditolak. Penghakiman Mahkamah dibawah diketepikan dan digantikan dengan penghakiman bagi pembeli untuk gantirugi nominal sebanyak RM10. Tidak terdapat perintah bagi kos dalarn Mahkamah di bawah.]

Cases referred to:
Jacques v. Miller 6 Ch. D. 153 ***(refd)***
Bonham-Carter v. Hyde Park Hotel Ltd. 64 TLR 177, 178 ***(refd)***
John v. Dharmaratnam [1962] MLJ 187 ***(refd)***
Popular Industries Limited v. Garment Manufacturing Sdn. Bhd. [1989] 3 MLJ 360 ***(refd)***
Malaysian Rubber Development Corporation Bhd. v.Glove Seal Sdn. Bhd. [1994] 3 MLJ 569 at 582 E to F ***(refd)***
Johnson v. Agnew [1979] 2 WLR 487 at p. 491 H to 492 A ***(refd)***
Bowlay Logging Ltd. v. Domtar Ltd. [1978] 4 WWR 105 at p. 117 ***(refd)***
Hadley v. Baxendale [1854] 9 Ex 341 at 354; 156 ER 145 at 151 ***(refd)***
Bank Bumiputra Malaysia Bhd. v. Mae Perkayuan Sdn. Bhd. [1993] 2 MLJ 76, 87-91 ***(refd)***
Robinson v. Harman (154 ER 363 at p. 365) ***(refd)***
C. Czarnikow Koufos Ltd. [1969] 1AC 350 ***(refd)***
C.& P. Haulage v. Middleton [1983] 1 WLR 1461 at pp. 1466-1468 ***(refd)***
Mallett v. McMongale [1970] AC 166 (at p. 176) ***(foll)***
Cochrane Decorators Ltd. v. Sarabandi [1983] 133 NLJ 588 ***(refd)***
Wenham v. Ella [1972] 127 CLR 454 ***(refd)***
Cullinane v. British "Rema" Manufacturing Co. Ltd. [1954] 1 QB 292 ***(refd)***
Flint v. Lovell [1935] i KN 354 CA (at p. 360) ***(refd)***
Davies v. Powell Duffryn Collieries [1942] AC 601 ***(refd)***
Cottril v. Steyning & Littlehampton Building Society [1966] 1 WLR 753 ***(refd)***
Nance v. British Columbia Electric Rly. (1951 AC 601, at 613) ***(refd)***

Legislation referred to:
Specific Relief Act, 1950, s. 18
Specific Relief Act, 1877, s. 19 (India)
Lord Cairn's Act, s. 2 (UK)
Contracts Act, 1950, s. 74

Other sources referred to:
McGregor on Damages 15th Edn. para 911 p. 914
Remedies for Breach of Contract by Hugh Beale

For the appellant - Porres Royan (Robert Lai with him); M/s. Jackson & Masacorale
For the respondent - Wong Kim Fatt (Christina Chia and K.C. Tho with him); M/s. Gulam & Wong

JUDGMENT

Edgar Joseph Jr. FCJ:

The Background Facts

This judgment relates to the proceedings which were a sequel to the judgment of the Supreme Court, dated 23 February 1993, reported under the name of *Tan Sri Khoo Teck Puat & Anor. v. Plenitude Holdings Sdn. Bhd.* in the Malayan Law Journal, the citation being [1993] 1 MLJ 113, and arose in this way.

In the High Court at Johor Bahru, on 23 May 1992, the learned Judge had, in a persuasive judgment (reported in [1992] 2 MLJ 68), made an order for specific performance of a contract for sale and purchase of land dated 20 August 1984, ("the Agreement") whereby the second defendant Rumah Nanas Rubber Estate Sdn. Bhd. ("the Vendor") had agreed to sell to the plaintiff Plenitude Holdings Sdn. Bhd. ("the purchaser") certain land comprised in Lot No.295

held under grant no.17259, situated in the Mukim of Tebrau, in the district of Johor Bahru, in the state of Johor, in area approximately 1,000 acres ("the land") at a price of RM47,939,958. The Judge had made a further order that the Vendor do pay damages to the purchaser to be assessed for wrongful termination of the Agreement and yet another order that the Vendor and the first defendant Tan Sri Khoo Teck Puat, ("Tan Sri Khoo") the chairman of the Vendor company do pay damages to the purchaser for breach of certain oral undertakings.

By these undertakings, Tan Sri Khoo, on his own behalf and on behalf of the Vendor, had promised to obtain a loan from the National Bank of Brunei or another source, to enable the purchaser to pay the balance of the purchase price ("the Loan Undertaking") and further, by way of alternative, that in the event of their being unable to secure such a loan, then Tan Sri Khoo had promised that his company, the Vendor, would enter into a joint venture scheme to develop the land ("the Joint Venture Undertaking") and this, in turn, would have required the incorporation of a company, with the purchaser and the Vendor having a 10% and 90%, equity therein, respectively.

The appeal by Tan Sri Khoo and the Vendor from the orders of the Judge aforesaid to the Supreme Court had been dismissed on 23 February 1993 on the grounds appearing in its judgment referred to in *Tan Sri Khoo Teck Puat & Anor. v. Plenitude Holdings Sdn. Bhd.* [1993] 1 MLJ 113, para 1 *supra.*

Upon dismissal of the appeal aforesaid, the purchaser had paid the balance of the purchase price of RM43,145,962.20, without recourse to the Loan Undertaking, with the result, that the land had been transferred to the purchaser which became the registered proprietor thereof, though only with effect from 17 March 1993.

Pursuant to the consequential orders of the Judge, aforesaid, the purchaser had filed a summons for assessment of damages and, upon the hearing thereof, the Judge had ordered that Tan Sri Khoo and the Vendor do pay to the purchaser the following sums of money:

(1) RM31,000 and RM31,783.50 for wrongful termination of the Agreement;

(2) RM13,500,000 for loss of profits;

(3) RM867,969 for loss of cash flow investment; and

(4) the sum of RM1,756,772.91 by way of interest on the deposit which had been paid by the purchaser to the Vendor under the Agreement.

In addition, the Judge had also ordered the payment of interest on the above amounts.

It is from the above orders of the Judge made upon the summons for assessment of damages, the reasons for which appear in his subsequent judgment reported in [1994] 2 MLJ 273, that the present appeal had been brought by Tan Sri Khoo and the Vendor. There is also a cross-appeal by the purchaser against the order of the Judge awarding the sum of RM13,500,000 for loss of profits, on the ground of its alleged inadequacy.

The Basic Issue

It is indisputable, and indeed it was common ground, that in Law, in appropriate circumstances, compensation may be awarded against a vendor in addition to specific performance. (See, s. 18, Specific Relief Act, 1950 (Revised - 1974) which is based on s.19 of the Indian Specific Relief Act, 1877, which in turn, has its roots in s. 2 of Lord Cairns' Act and *Jacques v. Miller*, 6 Ch. D. 153).

The appeal and the cross-appeal being only on quantum, the basic issue is whether the basis on which the Judge had assessed the damages was right, having regard to the particular circumstances of this case.

Preliminary Points

Before we embark upon a detailed consideration of the specific issues which arise for decision, there are three **preliminary matters** which, at the outset, require emphasis.

Firstly, that part of the judgment of the Judge which provides that the Vendor shall pay to the purchaser damages to be assessed for wrongful termination of the Agreement with costs and that Tan Sri Khoo and the Vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having **to prove its loss** (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd.* 64, TLR 177, 178:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

This *dictum* was referred to and applied by our Court of Appeal in *John v. Dharmaratnam* [1962] MLJ 187.

And, in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360, the Court had occasion to say this (at p.367):

> It is axiomatic that a plaintiff seeking substantial damages has the, burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example *Dixon v. Deveridge* and *Twyman v. Knowles*.

In *Malaysian Rubber Development Corporation Bhd. v. Glove Seal Sdn. Bhd.* [1994] 3 MLJ 569, at 582 E to F, Mohd Dzaiddin, SCJ, speaking for the Supreme Court quoted, with approval, the above passage in the *Popular Industries* case.

Secondly, it is important to identify the real nature of the purchaser's **cause of action**.

It was held by the High Court, and affirmed on appeal, that though the Vendor had purported to terminate the Agreement, it was not entitled to do so, with the result that specific performance had been ordered of the Agreement. The effect of this was that the Agreement was affirmed by the Court and so it remained alive and on foot throughout. In the event, instead of obtaining title to the land in 1988 as stipulated in the Agreement, the purchaser, did so only on 17 March 1993. This meant that the purchaser had to wait for five years before it could obtain title to the land and embark upon its development project. Clearly, the purchaser's cause of action was for damages for delay in completion. That delay was brought to an end by the decree for specific performance against the recalcitrant Vendor. We find, quite apt, the following passage in **McGregor on Damages** (15th Edn.) para 911 p. 914:

> ... More often he (the purchaser) will have the property transferred to him late, either because the delay does not discharge the contract or he elects not to treat the delay as a discharge, or because he forces the seller's hand by successfully suing for a decree of specific performance. In such a situation the measure of damages is properly regarded as damages for delay.

At this point, we would pause to refer to the Loan Undertaking, the **object** of which was clearly to enable the purchaser to obtain title to the land. On the other hand, the **object** for the alternative undertaking; namely, the Joint Venture Undertaking, was to ensure that if the purchaser failed to get title to the land, then at least it would be entitled to participate in a joint venture scheme involving the land with the purchaser and the Vendor having a 10% and a 90% equity therein, respectively. In other words, the Agreement contemplated, that if the purchaser secured title to the land without recourse to the Loan Undertaking, this undertaking would lose its importance, and similarly resort to the Joint Venture Undertaking, would not even arise.

In the event, the purchaser did succeed to obtain title to the land, although belatedly, and after forcing the hand of the Vendor, by way of an order for specific performance, but without recourse to the Loan Undertaking. This leads to the inevitable conclusion that the purchaser's true cause of action was for damages for delay in delivering title as a result of the wrongful termination of the Agreement by the Vendor.

In such a situation, neither undertaking was of anything more than historic interest; the Loan Undertaking was a breach without consequence, no evidence having been led as to what, if any loss, had been occasioned thereby; whilst the Joint Venture Undertaking was inoperative and of no effect.

In this context, we find the following words of Lord Wilberforce in *Johnson v. Agnew* [1979] 2 WLR 487 at p.491 H to 492 A apt:

> In this situation it is possible to state at least some uncontroversial propositions of law.
>
> First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the Vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.

Accordingly, the assessment of damages in this case should be arrived at having regard to the loss, if any, which the purchaser had **suffered and proved**, by reason of it not having obtained title to the land until after the order for specific performance passed by the High Court had on appeal been affirmed by the Supreme Court. It is vitally important that this point be kept in the forefront of our minds as failure to do so will lead to confusion and injustice.

Thirdly, by way of elaboration, it should be added that the effect of the undertakings was that if the purchaser had been **able** to raise the balance of the purchase price, in time, whether with or without the assistance of Tan Sri Khoo, there would be no joint venture scheme. But, if the purchaser had been **unable** to raise the balance of the purchase price in time, whether with or without the assistance of Tan Sri Khoo, there was to be a joint venture scheme, in which case, the land would have been transferred to a joint venture company with the purchaser and the Vendor having 10% and 90% equity therein, respectively.

In the events which transpired, the purchaser **had** been able to raise the balance of the purchase price, *suo motu*, that is to say, on its own and so without any assistance from **Tan Sri Khoo**, and to obtain an order for specific performance of the Agreement, with the result that the purchaser did not have to rely on either undertaking, which had been overtaken by events.

To put it another way, the purchaser did **not** accept the Vendor's repudiation of the Agreement, sue only for damages for breach, dropping any claim for specific performance. Had it done so, the undertakings would have occupied centre stage and the consequences of the Vendor's breaches of the undertakings would have been most material in the assessment of damages.

To illustrate, if as a result of a breach of the Loan Undertaking, the purchaser could not, *suo motu*, have obtained a loan from other sources and there had been a breach of the alternative Joint Venture Undertaking to enter into a joint venture scheme, then a claim for 10% of the profits (if any) accruing therefrom, would lie.

But, because the purchaser had been able, *suo motu*, to raise the balance of the purchase price which had been duly paid pursuant to the order of Court granting specific performance of the Agreement, thus obtaining title to the land, the Loan Undertaking, even though breached, was of no consequence, since no evidence had been led as to what, if any, loss had been sustained thereby. To illustrate, if as a result of a breach of the Loan Undertaking, the purchaser could only have obtained a loan from other sources at a higher rate of interest, a claim for reimbursement of the excess interest would lie.

As Berger J. said in the British Columbia Supreme Court case of *Bowlay Logging Ltd. v. Domtar Ltd.* [1978] 4 WWR 105 at p.117:

> If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. ... The fundamental principle upon which damages are measured under the law of contract is *restitutio in integrum*. The principle contended for here by the plaintiff would entail the award of damages not to compensate the plaintiff but to punish the defendant.

In the case of the Joint Venture Undertaking, no question of a joint venture scheme could have arisen considering that the purchaser was able, *suo motu*, to raise the balance of the purchase price and to obtain title to the land with the result that the Joint Venture Undertaking (which was an alternative undertaking) was inoperative and of no effect. There could be no question of the purchaser having the land and also a joint venture scheme.

It is against the backdrop of the three preliminary matters that we must embark upon a consideration of the individual heads of award made by the Judge. But, before doing so, it would be salutary to remind ourselves of certain well established principles governing the measure of damages for breach of contract.

The Governing Principles

The starting point regarding this part of the case is s. 74 of the Contracts Act, 1950 (Revised 1974), which is really declaratory of the Common Law rules enunciated in the celebrated case of *Hadley v. Baxendale* [1854] 9 Ex 341 at 354; 156 E.R. 145 at 151. (See, *Bank Bumiputra Malaysia Bhd. v. Mae Perkayuan Sdn. Bhd.* [1993] 2 MLJ 76, 87-91).

At Common Law, the general principle which constitutes the starting point in the assessment of damages for breach of contract is, in the words of Parke B. in *Robinson v. Harman* (154 ER 363 at p. 365):

where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same position with respect to damages, as if the contract had been performed.

This was cited with approval by the Court of Appeal in *C. Czarnikow Koufos Ltd.* [1969] 1 AC 350 at 414 and, 420.

But, the general principle aforesaid has been qualified and limited by *Hadley v. Baxendale* where the principles enunciated are these:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Explaining the distinction between the first and the second rules in *Hadley v. Baxendale*, Lord Wright in *Monarch S.S. Co. v. Karlshamns Oljefabriker* [1949] AC 196, said this (at p. 221):

The distinction there drawn (viz in *Hadley v. Baxendale*) is between damages arising naturally (which means in the normal course of things) and cases where there were special and extraordinary circumstances beyond the reasonable prevision of the parties. In the latter case it is laid down that the special facts must be communicated by and between the parties. The distinction between these types is usually described in English Law as that between general and special damages.

It goes without saying, that if the effect of allowing a plaintiff's claim, is to put him in a better position than he would have been if there had been no breach, then this would be contrary to the principles enunciated in the cases cited above. This means that **any profit which he stands to make because of the breach, must be deducted from the damages awarded** - a point aptly put by Mr. Hugh Beale in his most useful book on "**Remedies for Breach of Contract**" as follows:

The Basis of Assessment

In outline, the victim of a breach of contract is entitled to compensation for any loss which results from the breach and which is neither too 'remote', or unlikely, a consequence nor one which he could have avoided by taking reasonable steps in 'mitigation'. He is to be placed in the same situation as if the contract had been performed' (*Robinson v. Harman* [1848] 1 Ex. 850, 855). This involves considering his overall position. The damages should compensate him for the performance which he should have received but has not, with deductions for any savings he has or should have made through not having to perform himself or by other action, such as entering a substitute transaction with someone else. **Any profit which he is only able to make because of the breach of contract should also be deducted**. These deductions are made in accordance with the general principle that an award of damages should not put the victim in a better position than if the contract had been performed; he should recover no more than he has lost. Punitive or exemplary damages might be awarded where a breach of contract was also a tort, but in English law they are not awarded for a mere breach of contract (*Perera v. Vandiyar* [1953] 1 WLR 672).

(Emphasis provided)

Also relevant in this context, is what Ackner LJ (as he then was) said in the Court of Appeal case of *C. & P. Haulage v. Middleton.* [1983] 1 WLR 1461 at pp.1466-1468):

[Middleton] is not claiming for the loss of his bargain, which would involve being put in the position that he would have been in if the contract had been performed. He is not asking to be put in that position. He is asking to be put in the position he would have been in if the contract had never been made at all. If the contract had never been made at all, then he would not have incurred these expenses, and that is the essential approach he adopts in mounting this claim; because if the right approach is that he should be put in the position in which he would have been had the contract

> been performed, then it follows that he suffered no damage. He lost his entitlement to a further ten weeks of occupation after 5 October, and during that period he involved himself in no loss of profit because he found other accommodation, and in no increased expense - in fact the contrary - because he returned immediately to his own garage, thereby saving whatever would have been the agreed figure which he would have to have paid the plaintiffs ... [1467] It is not the function of the Courts where there is a breach of contract knowingly, as this would be the case, to put a plaintiff in a better financial position then if the contract had been properly performed. In this case the defendant ... would indeed be in a better position because, as I have already indicated, had the contract been lawfully determined as it would have been in the middle of December, there would have been no question of his recovering these expenses ... I do not consider that a plaintiff is entitled in an action for damages for breach of contract to ask to be put in the position in which he would have been if the contract had never been made. Accordingly, save in the respect to which I have already made reference, namely that there should be judgment for the defendant for nominal damages of £10, I would dismiss the appeal.

It is with the above principles in mind that we turn to consider the individual heads of award made by the Judge.

The Award of RM13,500,000 for Loss of Profits:

In making this award the Judge said this (at [1994] 2 MLJ 273 at p.281):

> In the instant case, the facts are somewhat similar to the *Bank Bumiputra* case. The defendants knew at the time the contract was executed that if there was a breach of contract and they did not honour their undertakings, the plaintiffs would suffer a loss, as the land had been purchased with a view to developing it into a housing project. The loss suffered by the plaintiffs was a natural and probable result of the defendant's breach of the contract.

More particularly, in giving his reasons for making this award the Judge said this ([1994] 2 MLJ 273 at pp.279-280):

> Sometime in the middle of 1987, the plaintiffs and the defendants after some discussions agreed to implement a joint venture scheme between the respective parties. The plaintiffs would hold a 10% share in that scheme and the defendants would hold a 90% share.
>
> As the plaintiffs had a 10% share in the joint development scheme with the defendants, the profits derived from the scheme would accordingly be 10% of the total gross profit before tax. PW1 stated that the total sales revenue projected by him was RM645,935,000. The total expenditure projected was RM421,625,000, and the gross profit before tax would amount to RM224,300,000. The plaintiffs' share of profit would amount to 10% x RM224,300,000 or RM22,430,000.
>
> The defendants called a witness Lim Wooi Hwee (DW.1). She stated that she was a Certified Public Accountant and was attached to a firm of accountants since 1979. She had prepared a report in regard to her findings which was marked as D4. In her evidence and her report, she stated that if the project had commenced in 1988, the profit of the plaintiffs would be RM15,797,000, and this would be the loss of profit of the plaintiffs.

And, later he concluded ([1994] 2 MLJ 273 at p.282):

> There have been two different computations in regard to the loss of profits made by PW.1 and DW.l. Taking all factors into consideration I take an average of the two figures relating to the loss of profits on the basis that the project started in 1987/88. The average of the two figures relating to the loss of profits amounts to RM19,113,500. However, there could be adverse conditions affecting the anticipated profits and a deduction of a reasonable percentage of 30% should be applied to the sum which is thereby reduced to a round figure of RM13.5 million. I accordingly award the plaintiffs a sum of RM13.5 million as damages for loss of profits.

With respect, the Judge appears to have **assumed**, as did leading Counsel for the purchaser before us, that, it was admitted by the Vendor's expert Miss Lim (DW.1) that the purchaser **had suffered** a loss of profits, amounting to RM15.8 million. In truth, Miss Lim made no admission of the sort.

On the contrary, the gist of Miss Lim's testimony was that the estimated share of the purchaser's profits - had development commenced in 1988, when completion should have, but did not take place - would have been a sum in the region of RM15.8 million before tax, whereas, had construction commenced in 1993, when it secured title to the land, belatedly, due to the recalcitrance of the Vendors and the consequent litigation - it would have made a substantially larger profit, to wit, RM23.2 million before tax.

In other words, according to Miss Lim, far from the purchaser suffering any loss of profits as a result of the delay, had it commenced the project in 1993, it would most probably have made a substantial increase in profit of RM7.4 million.

To revert to the judgment of the Court below, it is a curious fact, that while the Judge said that he preferred the testimony of the purchaser's own expert Mr. Song, an accountant in the permanent employment of the purchaser, who was very far from being a disinterested witness, to that of the Vendor's expert Miss Lim, an accountant in the employment of M/s. Coopers & Lybrand, a well known firm of Chartered Accountants, on account of the former's superior experience in the construction field, yet when it came to the crunch, his approach was to strike a compromise, that is to say, he took an average of the two estimates of the two experts as to profits likely to have accrued to the purchaser, had the project commenced in 1988. In other words, he gave precisely the **same weight** to the testimony of these two experts. He concluded by making a deduction of 30% to allow for contingencies.

The next point to note is the different **approaches** adopted by the rival experts in arriving at their conclusions as to the measure of damages.

In particular, Mr. Song's approach was to confine his estimate to the profits which he considered would have accrued to the purchaser had the project commenced in 1988, studiously ignoring altogether, the amount of profits which would have accrued to the purchaser, had the project commenced in 1993 - the year in which the purchaser had secured title to the Land - and this, notwithstanding cross-examination on that omission.

On the other hand, Miss Lim's approach was to make a **comparison** between the profits which would have accrued to the purchaser had the project commenced in those years, ending with the uncontradicted conclusion that the purchaser's profits would have been more by RM7.4 million (RM23.2 million - RM15.8 million) had the project commenced at the later stage.

The feasibility of the purchaser having commenced the development in 1993, was manifestly evident from the following admissions made by Mr. Song, under cross-examination at the trial (held in 1993); namely, that "the land is still available for the purpose of a housing project." And also, "The land was purchased by the plaintiffs for a housing scheme. The name of the scheme was referred to as Pekan Yayasan in 1987 ... If conditions are right, we intend to develop the land". Considering the area and location of the land - approximately 1,000 acres and just 8 miles from the City centre of Johor Bahru there is more than a ring of truth in these admissions. There was also uncontradicted evidence in the shape of a Valuation Report dated 23 July 1993, by the Vendor's Quantity Surveyor Mr. K. Parampathy (DW.2), showing that the land was ripe for housing development in September of 1987. The Agreement, it will be recalled, was dated 20 August 1984. In his report, Mr. K. Parampathy had stated that:

(1) the first stage "approval-in-principle" for a housing scheme had been secured from the State Authority on 16 December 1984.

(2) second stage approval, supported by layout and technical plans, had been secured from the State Authority on 17 August 1985, and

(3) the final approval for the layout plan had been secured from Jabatan Perancang Bandar & Desa, Johor, on 21 November 1987.

Furthermore, the Judge had conceded that the comparison approach adopted by Miss Lim was "attractive", but criticised her computation for 1993, because she had **not** taken into account the probable increase in the **cost** of building materials. But, the Judge had overlooked to note, that as against that, Miss Lim did **not** take into account, the probable increase in the **price** of dwelling houses in 1993.

The Judge also criticised the comparison approach adopted by Miss Lim on the ground "that no consideration was given to the fact that between 1993 and 2001 there could be many fluctuating market conditions that may well render the project a failure financially." ([1994] 2 MLJ 273 at p.281).

But, in this mortal world virtually anything is possible, and the correct approach for the Judge to have adopted when assessing damages, which depends upon a view of what will happen in the future, is that the Court must make an estimate as to what are the chances that a particular thing will happen, and whether they are more or less than even. In this, we are supported by the following passage in the judgment of Lord Diplock in *Mallett v. McMongale* [1970] AC 166 (at p.176):

> The role of the Court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a Court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

Had the Judge adopted this approach, as he undoubtedly should have - looking ahead over a period of some eight years commencing in 1993, with the increase in the cost of construction, both in terms of material and labour, not forgetting that land is always deemed in law to have a special value and is in the nature of things, absolutely limited, given continuing political stability, the chances of the price of houses increasing was, part of "the ordinary course of things", and so, in the words of Lord Diplock, "more than even". Such an approach would have supported Miss Lim's projections.

Indeed, there is authority to show that the comparison approach adopted by Miss Lim has much to be said for it. We refer to the case of *Cochrane Decorators Ltd. v. Sarabandi*, [1983] 133 NLJ 588, where on the facts in a sale of land situation, a delay in completion had led to a **reduction** of profit, and it was held that the purchaser was entitled to recover. The summary of the case reported in the New Law Journal dated 17 June 1983 at p.558 reads as follows:

> **Sale of Land: Delay in Completion**
>
> In September 1979, a property owned by S was advertised for sale for £150,000 as being suitable for conversion. It was subsequently sold to C Ltd for £142,500. Completion was to be on 2 January 1980, but, in fact, was delayed until 10 November 1980. C Ltd had planned to make a profit of £100,000 on the conversion of the property into flats, but on account of the delay in completion, they made a loss of £25,000 for building costs had increased considerably and the one-time buoyant property market was going into a decline. C Ltd now claimed damages from S.

It was held (Judge Stabb) that damages of £112,000 would be awarded. Damages for delay in completion was a perfectly permissible cause of action. S knew that the purchase of the property was made by C Ltd for the purpose of, converting it into flats. It was within the contemplation of the parties that the conversion was to be carried out for profit. Any breach of contract which led to a reduction of that profit would be damages which would properly be termed as having been in the contemplation of the parties at the time of the making of the contract. (*Cottrill v. Steyning and Littlehampton Building Society* [1966] 2 AER 295, and *Raineri v. Miles (Wiejski and another, third parties)* [1980] 2 AER 145, applied.)

It is true that in the *Cochrane* case, the purchaser was held entitled to recover for loss of profits due to **delay** in completion. But we fail to see any distinction in principle to prevent the same approach being adopted to demonstrate that the delay in completion had resulted not in a reduction but an **increase** in profits, which might go to show that the purchaser had in fact suffered no loss by reason of the breach of the Agreement and, indeed, would be in a better position than if the Agreement had been performed. In this, we are supported by the passages in the judgment of Ackner L.J. in *C & P. Haulage v. Middleton*, quoted above.

Even more important than the evaluation of the testimony of Mr. Song and Miss Lim, was the testimony of the Vendor's Chartered Surveyor Mr. K. Parampathy who gave uncontradicted testimony that the land was worth RM119,560,000 at the time of the trial, that is to say in 1993. When this fact was put to Mr. Song by Counsel for the Vendor, he did not deny it but merely said that he did not know.

Considering that the contractual price in this case was just under RM48,000,000, it is manifestly clear that far from suffering any loss by reason of the delay in the completion of the sale, the purchaser in this case had received a very substantial windfall of about RM70 million if, for example, it had sold the land instead of developing it. This sum would, of course be considerably more than the measure of profits of RM22.4 million estimated by Mr. Song as having been lost by the purchaser. In this context, we fail to see how the Notice of Assessment of the Assistant Collector of Stamp Duty, being Ex P5, could in any way assist the purchaser since it merely states that the market value of the land had been estimated by the Valuation Department of Inland Revenue Department to be RM67 million at the date of Agreement which was dated 20 August 84, for the purposes of stamp duty.

Nevertheless, it was submitted by Counsel for the purchaser that the fact that the price of the land had appreciated substantially should be ignored as being irrelevant in the assessment of damages. In other words, the effect of Counsel's submission is that events after the breach should never be considered when the Court assesses the quantum of damages. With respect, this view is not shared by the High Court of Australia for in *Wenham v. Ella* [1972] 127 CLR 454, Gibbs J. said (at pp. 473 to 474):

The general principle that damages are normally measured by reference to the circumstances at the date of the breach of contract does not mean that events that have occurred after that date may never be considered. The appellants contention on this point, if correct, would mean that evidence could never be given of the amount of profits lost as the result of a breach and that the every-day practice of receiving evidence as to the damage that had in fact flowed from a breach and as to steps that were or could have been taken to mitigate a loss is erroneous. However, the evidence as to the income in fact lost by the breach was in my opinion plainly admissible ...

Moreover, Counsel for the purchaser's submission regarding this part of the case, is flatly contradicted by Professor Hugh Beale who has pointed out in his book "**Remedies for Breach of Contract**", "**Any profit** which he is only able to make because of the breach of contract should also be deducted". (Emphasis provided). (See, the passage quoted in full, *supra*). And, similarly, as Ackner L.J. has pointed out in *C & P Haulage v. Middleton* (*ibid*) at p.1467:

> It is not the function of the Courts where there is a breach of contract knowingly,.. to put the plaintiff in a better financial position than if the contract had been properly performed.

It was further submitted by Counsel for the purchaser that the purchaser required the Land **not** for sale but for development. But this contention overlooks the point that the purchaser was a developer which required the land to develop for profit in which event it would have been sold.

Cottrill v. Steyning & Littlehampton Building Society [1966] 1 WLR 753 provides an illustration of recovery for loss of profits eventually, where the contract was for sale of land to a purchaser who carried on the business of development and to the knowledge of the vendor required the land to develop for profit but there had been a failure to complete and the vendor in breach of contract had conveyed the land to a third party.

In assessing damages for loss of profits, Elwes J. took into consideration the market value of the land at the date of the proposed development less expenses attributable to the carrying out of the development. The following passages in his judgment show his reasoning:

> It is clear, in my opinion, that if the defendants are shown to have known that the plaintiff intended to develop the land for profit special circumstances are established which entitle the plaintiff to have the damages assessed by reference to the profits which both parties contemplated he would make.

And, in the final para he concluded as follows:

> I accordingly direct, on the basis of reasonable probability, that the damages should be assessed on the footing that planning permission would have been granted six months after 10 May 1957, the date of the plaintiff's return from abroad, and that the required modifications of the tree-preservation order would have been made; that the plaintiff would have been able to proceed with his plan to turn the hotel into flats and build six dwelling houses, and that such building and alteration would have been completed within 18 months of May 10. The market value of the property is to be ascertained accordingly and the damages assessed at that figure less the expenses attributable to the building work and all matters ancillary thereto. There will be judgement for the plaintiff.

Similarly, here, assuming the Vendor had in breach of contract sold the land to a third party the purchaser's loss would have been measured by the principles enunciated in *Hadley v. Baxendale*. Therefore, in such a situation, since the Vendor knew at the time of the Agreement of the purchaser's intention to develop the land for profit, it would be liable to indemnify the purchaser for loss of those profits it would have made in 1988 as was the case in *Cottrill's* case.

But, unlike *Cottrill's* case, under the order of the Judge not only has the purchaser got the land **and** also the profits which the purchaser would have made had sales taken place in 1988 but in addition to that, after final conversion and subdivision, the purchaser would be making the sales at current rates. It follows that the value of the land in 1993 after final conversion and subdivision estimated by Mr. K. Parampathy at RM119,560,000 would be relevant as this is tied to the price of sales at current rates.

On the other hand, if the purchaser had stood to make more profits in 1988 as compared to 1993, then clearly it would be entitled to be reimbursed by the Vendor in respect of the difference since this would represent its loss. By the same token, in a converse situation, if the purchaser stands to make more profits from sales in 1993, reason and justice point to the conclusion that this too should be taken into account and the Vendor given credit for it. Therefore, the value of the land in 1993 would also be relevant, as this, too, would be tied to the price of sales at current rates.

In considering the overall position of the purchaser, the Court should not wear blinkers and ignore the fact that the purchaser stands to make a substantial profit on the price increase of the

land alone only because of the breach of contract, which should therefore be deducted from the loss of profits. Not to do so would be to put the purchaser in a better position than it would have been if the contract had been performed in 1988. Also, to countenance such a claim by the purchaser would amount to countenancing a claim for double recovery.

In short, upon the evidence, the purchaser had not proved its claim for loss of profits.

It follows that the award for loss of profits under this head must be, and is, set aside.

The awards of RM31,000 and RM31,783 by way of reimbursement of fees for the Engineer and the Surveyor, respectively, each of which included an element of service tax.

The basis of the purchaser's claim which resulted in these two awards, was that they represented costs thrown away, that is to say, wasted expenses. But when it is remembered that the purchaser had also claimed for loss of profits and that now that it has secured title to the land, and most probably will be proceeding to develop the land for profit, these two awards represent expenses which the purchaser would have incurred anyway. In other words, these two awards do not represent wasted expenses or costs thrown away.

The object of damages is to restore a plaintiff to the position he would have been in but for the wrong. When, as here, the purchaser has claimed loss of profits for anticipated sales, it would have to be assumed that these two awards are based on expenses which would have been incurred anyway. This point was made in *Cullinane v. British "Rema" Manufacturing Co. Ltd.* [1954] 1 QB 292 wherein it was held that a plaintiff could not claim both his capital loss, i.e. expenditure incurred, as well as his loss of gross profits. The plaintiff was required to choose between his two claims; in other words, he would have to elect between being put back into the position he would have been if the contract had not been made, that is to say recover his net outlay **or** claim what he would have received if the contract had been made, that is to say, recover his gross profits on lost sales.

It is also worth mentioning that these awards included an element of sales tax, although at the material time, the law under which sales tax for professional services rendered had not yet come into force.

The Judge should therefore have disallowed both these claims for the reasons stated, and we would accordingly set aside these awards.

The Award of RM1,756,772.91 being Loss of Interest on the 10% deposit paid under the Agreement

The Judge considered that the Vendor "by wrongfully terminating the Agreement must in all fairness compensate the plaintiff".

With respect, there were concurrent findings both by the Judge and the Supreme Court that the Agreement was never legally terminated. Both Courts went on to hold that the purchaser was entitled to specific performance of the Agreement and, consequent thereto, the purchaser had obtained title to the Land, although belatedly. At all material times, the purchaser had treated the Agreement as being alive and on foot and was vindicated by both Courts with the result that the deposit became the property of the Vendor, the purchaser having no right to the use of the money.

It follows that the award under this head of claim was, with respect, quite untenable - a point, which incidentally, had been conceded by Counsel for the purchaser - and must be, and is, set aside.

The Award of RM867,969 for Loss of Cash Flow Investment.

The rationale or basis of this claim is that the purchaser's surplus cash could be invested in short term money market securities.

The Judge made this award by averaging the sum of RM325,000 quantified by the Vendor's expert Miss Lim and the sum of RM1,410,900 quantified by the purchaser's expert Mr. Song.

It was submitted by Counsel for the purchaser, and we agree, that this was not the correct approach for the Judge to have adopted.

When, as here, there was a conflict of expert testimony, the correct approach for the Judge to have adopted was not to cut the Gordion knot, as it were, by averaging out the two quantifications aforesaid, but by analysing the reasoning of the rival experts, and then concluding by accepting the version of one over the other.

We have already referred to the fact that the anticipated profits of the project had it commenced in 1993, would have been substantially higher than if the project had commenced in 1988, so that on the basis of Miss Lim's testimony, the sum of RM325,000 would have been offset by the higher profits.

But, more to the point, the idea underlying this head of claim was the concept of the Joint Venture Scheme with the purchaser and the Vendor, having a 10% and a 90%, equity therein, respectively. However, as events turned out, the concept of a Joint Venture Scheme never materialised, since the purchaser did, indeed, secure title to the land. If the concept of a Joint Venture Scheme failed then this award must necessarily fail.

We would accordingly set aside this award as being based on a misconception.

The Purchaser's Cross Appeal

In this Cross Appeal, Counsel for the purchaser had contended that when assessing damages for loss of profits in the manner he had done the Judge should not have made a deduction of 30% to allow for contingencies. A more appropriate deduction - so he said - would have been one of 5% or 10%, in which case., the resulting sum would have been at least RM19 million.

In view of our conclusions in the Principal Appeal on the award for loss of profits made by the Judge, the Cross Appeal must fail and is accordingly dismissed.

In Retrospect

Stepping aside and taking a second hard look at this case and considering the overall position of the parties, we would summarise, the probable scenarios past, present and future as follows.

Broadly stated, the question for decision before us, is whether the basis upon which the Judge had assessed the damages was right. In considering this question it would be essential to keep in the forefront of our minds the guidance provided by Lord Diplock in *Mallett v. McMonagle* (*supra*) as to the role of the Court in making an assessment of damages, quoted above.

First of all, it is necessary to consider what might have happened if Tan Sri Khoo and the Vendor had punctually performed their obligations under the Loan Undertaking provided for in the Agreement. In such a situation, the loan would have been arranged to enable the purchaser to complete the purchase, and upon payment of the balance of the purchase price to the Vendor, the Land would have been transferred to the purchaser in 1988, whereupon, the purchaser would have been in a position to commence development in the same year or the next.

Secondly, and in the alternative, what would have happened if no loan had been arranged by Tan Sri Khoo to enable the purchaser to pay the balance of the purchase price and to complete the purchase?

In such a situation, assuming compliance by the Vendor with the Joint Venture Undertaking, which was an alternative undertaking, as provided under the Agreement, instead of securing title to the land, the purchaser would have secured a 10% equity in a joint venture company to which the land would have been transferred, while the Vendor would have had a 90% equity therein. Presumably, the Joint Venture Company would then have commenced development, and the purchaser would have received 10% of the profits from the sales whilst the Vendor would have received 90% thereof. The point of central importance in this scenario, would be that the purchaser would **not** be receiving **both** the land and profits.

Thirdly, in the events which transpired, what did happen, however, was that Tan Sri Khoo and the Vendor did not honour either undertaking but the purchaser succeeded in forcing the hand of the recalcitrant Vendor by way of a decree for specific performance, granted by the Judge, and affirmed on appeal to the Supreme Court. The purchaser then went on, *suo motu*, to raise the balance of the purchase price on 31 December 1992 and to secure title to the land on 19 March 1993, when the transfer had been registered. By then, according to the uncontradicted testimony of the Vendor's Chartered Surveyor Mr. K. Parampathy, the fair market value of the land had shot up to approximately RM120,000,000.

At the end of the day, the purchaser got the land worth approximately RM120,000,000, for which they had paid only RM47,939,958, **and in addition**, the Judge had awarded it: (a) a sum of RM13,500,000 for loss of profits arising from anticipated sales of buildings on the Land, (b) a sum of RM867,969 being loss of cash flow investments, (c) sums of RM31,000 and RM31,783.50, for wrongful termination of the Agreement, and (d) a sum of RM1,756,772.91 by way of interest on the deposit which had been paid by the purchaser to the Vendor under the Agreement. And, with respect, what was overlooked by the Judge was that the purchaser would now be in a position to make even more profits from sales at current rates.

In the result, the purchaser was placed in a far better position than it would have been in if there had been in due compliance by the Vendor and Tan Sri Khoo, with their respective obligations, in 1988. This would be contrary to the fundamental principle of the role of the Court when making an assessment of damages, namely, to ensure that the victim of a breach of contract is "to be placed in the same situation as if the contract had been performed". (See *Robinson v. Harman* (54 ER 363 at p.365).

Unfortunately, nowhere in his judgment did the Judge direct his attention to the various scenarios outlined above, with the result that he did not consider the overall position of the parties as he undoubtedly should have.

Conclusion

We need hardly add that in considering this appeal, and in particular, the grounds upon which an Appellate Court would be justified in interfering by reassessment of the damages, we have reminded ourselves of what Greer L.J. had said in *Flint v. Lovell* [1935] i KN 354 CA (at p. 360). "This Court", he said:

> will be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to

make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

In other words, the two situations in which an Appellate Court would be justified in interfering by reassessment of the damages would be where the trial Judge has acted on a wrong principle or has made an entirely erroneous estimate of the damages.

The statement of the law in *Flint v. Lovell*, quoted above, was followed by the House of Lords in *Davies v. Powell Duffryn Collieries* [1942] AC 601 (per Lord Wright, at pp. 616-617 and per Lord Porter, pp 623-624) and also by the Judicial Committee of the Privy Council in *Nance v. British Columbia Electric Rly.* (1951 AC 601, at 613).

For the various reasons adumbrated above, we are compelled to conclude, with respect, that the basis upon which the Judge had assessed the various awards of damages, cannot be supported in law, having regard to the particular circumstances of the present case, and the relevant authorities.

In the result, we would allow this appeal with costs, set aside the judgment of the Court below and substitute, in lieu thereof, judgment for the purchaser for nominal damages only of RM10. There will, however, be no order as to costs in the Court below because of the inconsistent positions taken by Counsel for the Vendor and Tan Sri Khoo before us as compared to that in the Court below. In particular, **whereas** in the Court below, Counsel's primary contention was that some damages, other than nominal damages, though far less than had been claimed, ought to be awarded, before us, his primary contention was that only nominal damages should be awarded.

Deposit paid as security for the costs of the appeal to be refunded to the Vendor.